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L O N D O N :

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The P R E F A C E.

WHEN a Bill was some Time since depending in Parliament concerning TITHES, the Design of which was to prevent the many Suits continually carried on by the Clergy, to their *own* Great SCANDAL, and the *Vexation* of their *Parishioners*, a certain Reverend Prelate, who has remarkably distinguish'd himself wherever the Interest or Authority of the Clergy are concern'd, was pleas'd to throw out his Remarks on the said Bill, which, on Account of the Multiplicity of Business then before the House was put off; and a Bill being now depending *for the better regulating the Ecclesiastical Courts*, which have long call'd aloud for Reformation, there have been handed about some Remarks thereon, which, there is very good Reason to believe, came from the *same Hand*, since it is evident that the same Zeal and Concern as appear'd at *that* Time for their *Interest*, distinguishes itself as much at *this* for their *Authority*.



REMARKS

UPON A

BILL now depending in Parliament,

ENTITLED

*For the better Regulating the Proceedings
of Ecclesiastical Courts.*

By a Right Reverend PRELATE.

THE present Methods used in Ecclesiastical Courts, for the detecting and punishing of Vice, and reforming other Irregularities within their proper Cognizance, which also are the Methods that have been used and exercised from Time immemorial, are as follow.

Some Time before the Visitations of the Bishop or Archdeacon are held, Articles of *Enquiry*, founded upon the Ecclesiastical Laws of this Realm, are sent to the Churchwardens of every Parish, in order to inform them, What are the particular Immoralities in Clergy and Laity, and the Neglects of Duty in the Clergy, which they are bound by their Office to Present.

At the Time of the Visitation, the Churchwardens make their Presentments *upon Oath*, according to the Tenor of the said Articles; upon which Presentments, the Judge proceeds in the following manner.

First, Citations are decreed to be sent out, requiring the Persons presented to appear on a certain Day, to answer to such Articles as shall then be objected to them. If they confess the Crime, Penance is enjoined; if they deny it, Churchwardens are called upon to make good their Presentment, and Articles are minister'd to the Party upon the Foundation of that Presentment. Next, follows the Party's Defence; and after that, the Examination of Witnesses on both sides; and Depositions are taken in the same Method as in *Chancery* and other Courts of Equity, and the Witnesses may be cross-examined upon proper Interrogatories.

If the Proof be full and clear, the Party is enjoined to perform Penance; if only probable, but yet such as has given just Occasion for Scandal and Common Fame, the Party is dismissed, with an Admonition to avoid such *Occasion* of Offence for the Time to come.

In case the Party accused think himself aggrieved either in the Course of the Proceedings, or the final Sentence, an Appeal lies from the Ecclesiastical Courts to the Court of *Delegates*, of which some of the Judges of the *Common Law* are always a Part; and the Concurrence of *one* of them at least, is absolutely necessary to the final Determination.

The Crimes presented and punished in this way, are chiefly Incest, Adultery, Fornication, and other Acts of Lewdness. And it is certain, that Presentments and Prosecutions thus regularly carried on, and the Apprehension of the Shame that attends them, to Families as well as Persons, are great Checks to Lewdness of all kinds; and if these Checks were removed, we should in a little time see those Practices far more open and familiar among the People, than they are at present.

I.—II. But if the Meaning of the *first* Clause in the Bill be, either that no Articles of *Enquiry* shall be sent out preparatory to the Visitation, nor any Presentments made; or that no Process shall issue in pursuance of any Presentment unless the Party presenting (though upon Oath and in the Discharge of his Duty) will oblige *himself*, unsupported by the Parish, to prosecute, and give Security for the Payment of Costs. — Or if, according to the Tenor of the *second* Clause of the Bill, the Court to which the Presentment is made, is not to be allowed to proceed to the Proof of the *Facts* in the ancient and ordinary Way, but those Facts are to be taken out of their Hands, and tried at great Expence and Trouble in another Court, and before other Judges: If all or any of these should be intended by the Bill, and it should pass into a Law, the Correction of Manners and Punishment of Vice is, so far, taken out of the Hands of the Bishops and their Courts; and the Provisions which follow, 'That Excommunication shall not be attended with any civil Incapacities, 'That Commutation Money shall be disposed of to the Poor of the Parish, 'That all Prosecutions shall be begun within a certain Time, and, 'That none shall be prosecuted twice for the same Offence'; are all of them *needless* Additions; since it is certain, that if the two first Clauses in the Bill be enacted, there will be neither Presentment nor Prosecutions, and by Consequence neither Excommunication, nor Penance, nor Commutation.

III. As to the last mentioned Article (of remitting Facts to other Courts, in order to be tried by a Jury,) the Unreasonableness of it will farther appear by the Course of Proceedings in the Temporal Courts. When a Cause of Property is depending before them, and is found to turn upon the Point of *Marriage* or *no Marriage*, the Judges of *Westminster-Hall* do not send that Fact to be tryed by a *Jury*, but they send it to the Ecclesiastical Court, to be examined and determined by the Rules and Methods of that Court, to which the Cognizance of Matrimonial Causes properly belongs. And so far as the Cause depends upon that Fact, the final Judgment of the Temporal Court is grafted upon the Sentence given in the Ecclesiastical Court, and as certified from thence. Much more ought the Ecclesiastical Judges to be allowed to proceed (as they have done from Time immemorial) to the Examination of Facts by their own Rules, when the *Original* Cause is within their own Cognizance; as all Causes are which relate to the Correction of Manners.

If it be said, that *Lewdness*, as well as other Crimes may be punished in virtue of Temporal Laws to be made for that End, and executed by the Civil Magistrate

gistrate; let it only be considered, what Effect the Addition of such Laws has had, for the Restraint of Drunkenness, common Swearing, and Profanation of the Lord's Day; and then no doubt can remain, what Effect they *would* have for the Restraint of Lewdness.

As the Laws now stand, the Spiritual Courts may proceed against all Crimes within their proper Cognizance, not only on Presentment made, but likewise *Ex Officio*. Which Process *Ex Officio*, is carried on by a *Promoter*, either *Voluntary*, when a Person desires the Aid of the Court for the Punishment of any Vice or Irregularity within their proper Cognizance; or *Necessary*, when the Judge receives Information of any such Vice or Irregularity committed, and finding Cause to believe the Information well founded, appoints a Promoter, and cites the Party, and proceeds in the usual Form.

The voluntary Promoter is to give Security, if demanded, for prosecuting and paying of Costs; and the necessary Promoter so appointed by the Judge, though he gives no Security, is to be a Party upon an Appeal, and is liable to pay such Costs as shall be decreed by the superior Court; which is a sufficient Restraint from proceeding *hastily* to such Prosecutions, especially, considering how frequently Witnesses are drawn, by private Influences, to depart from their first Informations.

This latter Method is not usually practised in the Case of the *Laity*, unless the Neglect or Omission of the Churchwardens in the Discharge of that Part of their Duty, be flagrant and notorious. But as to the Clergy, though we suppose Presentments and Prosecutions thereupon to be continued in the present Form, and the Bishop to be only restrained by this Bill from proceeding against them *Ex Officio*, it is easy to foresee what the Consequences must be, if negligent or irregular Incumbents were allowed to go on securely, as long as they can prevail with the Churchwardens not to Present them; when they know at the same time that the Hands of the Bishop are tyed up, and have no Cause to apprehend that any other Accuser will be found, so zealously disposed, as to undertake the Prosecution at his own Charge.

IV. If the next Clause in the Bill were a Provision, That the Censure of EXCOMMUNICATION shall be used only in Causes of Correction of Manners; and that in all Causes of Property and Temporal Interest, the Ecclesiastical Court shall be enabled to enforce Obedience to their Orders by ATTACHMENT, in the same Manner and with as full Power as has been and still is practised, not only in all the Courts of *Westminster-hall*, but in the Court of Admiralty, where the Proceedings are according to the Rules of the Civil Law: This is what has been heretofore thought of, and seems not liable to any Objection. But if the Censure of Excommunication (whether *with* or *without* Civil Incapacities) is no longer to be used and applied, though the Cause be of a mere *Spiritual* Nature; the Church of *England* will be thenceforth deprived of a Right which belongs to every Christian Church, and which all other Churches actually enjoy at this Day, *viz.* The Right of Judging what Persons are fit or unfit to be *Excluded* from Christian Communion, and *Restored* to it. And as to the Method which the Bill provides for enforcing Obedience in Matters of a *Temporal* Nature; it is evident at first Sight, what great *Delays* it would occasion in the Course of all such Suits, and by Consequence how great a *Detriment* it would prove to the Subject, both which would be effectually prevented by an *Attachment*: Nor can any good Reason be assigned, why the Benefit of an *Attachment* should not be *equally* extended to all Causes, which equally concern Temporal Property.

V. As to COMMUTATIONS (supposing them to be practised) there seems to lie no Objection against applying the Monies received on that Account to the Relief of the Poor of the Parish where the Offence is committed, provided it be distributed by the Minister, Churchwardens, and Overseers, under an Obligation to certify to the Court within a Time assigned, that the Monies have been distributed according to Direction. By the Act of Uniformity, the Disposal of the Offering-Money at the Communion is in the Minister and Churchwardens; and if they disagree, the Ordinary is to appoint how it shall be applied; and no Reason is assigned or intimated in the Bill, why the like Direction in the Case of Commutation-Money should be taken from the proper Court, and placed in two Justices.

VI. Where the Personal Estate of the deceased is inconsiderable, it may be a proper Relief to the poorer Sort, that the Officers of the Ecclesiastical Courts be restrained to a certain Value, to be specified by the Legislature, under which the Parties concerned shall not be obliged to pay any Fee for Letters of Administration or probate of Wills, except a small Fee to the Register (to be limited likewise by the Legislature) for the Labour of Writing; as was done in the Statute 21 Henr. 8. c. 5. for all Estates under five Pounds. Provided, the Parties appear when cited, and make Oath, that the Personal Estate of the deceased was *under* such Value; because if they be not liable to be cited, and obliged to take such Oath, the Value cannot be determined, nor by Consequence can it be known, whether they are *entitled* to that Favour, or not.

The plain Inconvenience of Wills being not proved, is the Damage which may happen to Legatees, by not knowing, thro' the Dishonesty of Executors, that they are Legatees; and which others may sustain for want of knowing how Estates are *limited* and *entailed*. And a further Inconvenience attending the Neglect of taking out both Probats of Wills and Administration to Intestates, is the Damage that may accrue to Persons who have an Interest, and especially to *Minors* and *Orphans*, for want of its being ascertained, (as it is in both Cases, by the *Inventory* delivered into Court upon Oath) what Effects the deceased died possessed of, and whether or no any Part of those Effects is concealed, or has been wasted. To which it may be added, that when Wills are duly proved, and Administration taken out, both Executors and Administrators are put under the Obligation of an Oath, and Administrators under the additional Obligation of a Bond, to discharge their respective Trusts *faithfully* and *honestly*.

21 Hen. 8. These Considerations were probably the Motives which induced the Legisla-
 c. 5. 19 Car. tures in former Reigns, to give Relief to the Executors and Administrators, where
 2. c. 7. 5. 6. the Effects were of small Value, not by freeing them from the Obligation to prove
 Will. & Wills and take out Administrations (as is proposed in the present Bill) but by
 Mar. c. 21. making the Charges of both very small.

Upon the whole: — Matters of so great Consequence to the Nation, as the Punishment of Vice, the altering the ancient and established Method of Judicial Proceedings, and the Providing against Abuses in Things of such universal Concern as Wills and Administrations, require great Consideration. If any Thing be found amiss in the present Methods, it is fit it should be rectified; but before larger Steps are taken, it is to be hoped it will be carefully attended to, what the State of these Things must unavoidably be, when the present settled Course of Proceedings shall be taken away, or, which is the same, be render'd ineffectual.

It will also deserve Consideration, whether it be fit to put the Study and Profession of the *Civil Law* under so great Discouragement, as the Alterations proposed in this Bill would occasion; since so many Matters which concern the Right and Interest of the Subject, are under the Cognizance and Determination of that Law; and since the Knowledge of it is so useful and even necessary in all Transactions with Foreign Powers, as being the known Rule of conducting publick Treaties, and the *only* Rule in which the several Powers in *Europe* agree.

ABSTRACT OF A BILL,

Now Depending in Parliament

*For the better Regulating the Proceedings of
Ecclesiastical Courts.*

IT is proposed by the said Bill, That no Suits or Prosecutions, stiled *pro Salute Anima*, or *pro Reformatione Morum*, or for any Criminal Matter, shall be commenced in any Ecclesiastical Court, either by Inquisition or Denunciation, against any Person whatsoever, but by Accusation only, at or upon the Information or Promotion of some Person, who shall, at the time of exhibiting such Information, enter into Bond to the Register of the Court, in which such Information shall be exhibited, in the Sum of — with — or more Surety or Sureties, in the Sum of — who shall severally justify themselves by Oath, in open Court (which Oath the said Courts are hereby impowered to administer *Gratis*) to be respectively worth the said Sums in the said Bonds mentioned, over and above their just Debts; which Bond shall be conditioned to prosecute such Suit or Information with Effect, and to pay — Costs to the Defendant or Party accused, in case such Defendant shall not be found guilty; or if the Suit or Prosecution be abated or discontinued for the Space of — And the said Register is hereby required, immediately on the Acquittal of the Defendant in the said Ecclesiastical Court, or such Discontinuance or Abatement of such Suit or Prosecution, to assign the said Bond to the said Defendant, by endorsing the same, and attesting it under his Hand and Seal, in the Presence of — or more credible Witnesses, in the same Manner, as Bail Bonds, or other Securities given to Sheriffs in Suits in the Temporal Courts, are now by Law assignable; upon which

which Bond the said Defendant may bring an Action and Suit in his or her own Name, in any of his Majesty's Courts of Record at *Westminster*, (in which Suit the said Assignment shall be full Evidence of his or her Acquittal, or Discontinuance of the Suit), and shall recover thereon, against the said Informer and Sureties, — Costs of Suit in the said Ecclesiastical Court.

It is also further proposed by the said Bill, That, no Citation, Summons, or other Process, shall issue, to cite any Person to appear, any Articles, Information, Libel, or Accusation, for any Criminal Cause, till the Informer or Promoter shall have given such Security, as aforesaid; and the Person making out any Citation, Summons, or other Process, shall, at the Time of making it out, indorse it with the Name and Place of Abode of the Informer and Sureties; And any Officer of any Ecclesiastical Court, making out or issuing, or causing to be made out or issued, any Citation, Summons, or other Process, against any Person, before such Surety given, or neglecting to indorse the Name and Place of Abode of such Informer and Surety, as aforesaid, shall — And every Person serving any Citation, Summons, or other Process, in any Criminal Cause, not indorsed, as aforesaid, shall — And all Proceedings in any Criminal Cause, without such Security taken, as aforesaid, are hereby declared to be — And every Proctor, Apparitor, or other Ecclesiastical Officer, being Informer or Promoter, or exhibiting any Articles, Information or Libel in his own Name, or at his own Promotion, in any Criminal Cause, in any Ecclesiastical Court, shall be deemed a —, and shall —

It is also further proposed by the said Bill, That in all Suits and Prosecutions filed *pro Salute Animæ*, or *pro Reformatione Morum*, or for any other Criminal Cause, if the Party accused shall at any Time before Judgment suggest, (without Oath) that he or she is not guilty of the Crime laid to his or her Charge, it shall and may be lawful to and for any of his Majesty's Courts of Record, (who now have Power to grant Prohibitions) to grant a Prohibition to any Ecclesiastical Court where such Suit or Prosecution is depending; the Judge or Judges whereof, immediately upon Receipt of such Writ of Prohibition, are hereby required to certify, under the Seal of the Court, the Original Libel, Articles, or Information against such Person, and return the same, together with the Bond entered into by the Informer and his Surety, as aforesaid, into the Court, from which the Prohibition issued, who are hereby impowered, on the Defendant's pleading not guilty to the said Libel, Articles, or Information, to try the same by a Jury of Twelve Men of the County, where the Offence is laid to be committed, in like manner as Indictments removed by *Certiorari* from inferior Courts are tried; and if the Person accused shall on such Trial be convicted of the Crime or Crimes laid to his or her Charge, the said Court, out of which the Prohibition issued, is hereby directed to grant a Writ of Consultation, and send back the said Original Libel to the Ecclesiastical Court, out of which the Cause was removed, that the said Ecclesiastical Court may proceed to inflict such Ecclesiastical Censures as they may do by Law; but if the Person accused shall be acquitted on such Trial, then it shall be lawful for such Court, granting the Prohibition, as aforesaid, to allow the Defendant — Costs in both Courts, and to enforce the Payment of the said Costs, by Attachment against the Informer and Sureties, as in Cases of Costs in other Actions; and all Proceedings in such Criminal Causes, contrary to such Writ of Prohibition sued forth and delivered to the Judge of any Ecclesiastical Court, shall be —

It is also further proposed by the said Bill, That upon Proof by — that a Citation, or other Process to appear in the said Ecclesiastical Courts, hath been

been personally served on the Defendant in such Suit, or left with the Wife or Servant of such Defendant, at his or her Dwelling-House, or usual Place of Abode, if the Defendant so served shall not appear, by him, or herself, or by his, or her Proctor, or Attorney, at the Time and Place appointed by that Citation, or Process; a second Citation, or Process, indorsed, as aforesaid, shall issue, which being proved on Oath, to be served in like manner, and the Defendant neglecting to appear by him, or herself, or by his or her Proctor or Attorney, at the Time and Place appointed by such second Citation or Process, the Judge of the Ecclesiastical Court, out of which such Citations, or Processes shall have issued, shall certify the same under his Hand and Seal; upon which Certificate it shall be lawful for the High Court of Chancery, to issue a Writ of Contumacy, in the Form, or to the Effect hereafter prescribed, to compel the Defendant, or Defendants, to appear at the Return of the Writ in the said Ecclesiastical Courts, either personally, or by his, or her Proctor, or Attorney; which if the Defendant shall refuse, or neglect to do, a second Writ of Contumacy shall issue, and so from Time to Time, until the Defendant, or Defendants shall personally, or by his, her, or their Proctor or Attorney, appear in the said Ecclesiastical Court; upon which Writ of Contumacy, the Sheriffs shall return Issues, and proceed, in every Respect, in the same Manner, as they now do on Process of Distress, issuing out of any of the Courts at *Westminster*, against Privileged Persons or Corporations; which said Writ of Contumacy shall be in the Form, and to the Effect following, *videlicet*.

G E O R G E the Second, &c. To the Sheriff
of ----- Greeting:

W H E R E A S it hath been certified to us, under the Hand and Seal of A. B. that C. D. of ----- hath been twice duly cited to appear before him the said A. B. in ----- Court, to answer to ----- notwithstanding which Citations, the said C. D. hath hitherto contumaciously refused, or neglected to appear; either by himself, or his Proctor, or Attorney in the said Court: We do therefore (according to the Statute in that Case lately made and provided) hereby command you to distrain the said C. D. by all his Goods and Chattels in your Bailiwick, so that neither he, nor any one for him, do intermeddle therewith, until you shall have other Command in that Behalf from us, and that you answer us for the Issues of the same, so that you thereby compel the said C. D. to appear by himself, or his Proctor, or Attorney, in the said Court, the ----- Day of -----
Witness our self at Westminster, the ----- Day of -----

It is further proposed by the said Bill, That no Money hereafter to be paid by any Offender in any Criminal Cause, as Commutation of Penance, or in Lieu thereof, or to excuse the Offender from any Kind of Penance, shall be paid to, or received by any Person whatsoever, except to the Overseer, or Overseers of the Poor of the Parish, or Place, where such Offence shall have been committed; which Sum, or Sums of Money, being received by the Overseers, is, and are hereby directed to be distributed by them amongst the Poor of the Parish, or Place, where such Offence was committed, in such Manner as shall be directed by ----- Justices of the Peace, residing in, or near such Parish, or Place; and every Person, (other than such Overseer, or Overseers, as aforesaid,) receiving any such Money for Commutation of Penance, and every Person paying any such Money for Commutation of Penance, to any Person, (except the said Overseer, or Overseers,) and every such Overseer, or Overseers, refusing, or neglecting, for the Space of ----- Days, to distribute the said Sum, or Sums of Money, according to such Direction of the said Justices, as aforesaid, shall respectively, in any or either of these Cases *It*

It is also further proposed by the said Bill, That all Prosecutions shall be commenced in the said Courts, within the Space of — after the Crime, or Offence committed; and that no Person shall be prosecuted twice for the same Offence.

It is also further proposed by the said Bill, That no Person, who shall be excommunicated after — shall incur by such Excommunication, any Legal Disability whatsoever, but every Person excommunicated, shall enjoy all Privileges and Benefits of the Law, in as full and ample a Manner, as if they had never been excommunicated; any Law, Usage or Custom to the contrary thereof in any wise notwithstanding.

It is also further proposed by the said Bill, That no Judge, Officer, or any other Person belonging to any Ecclesiastical Court, shall, *ex Officio*, make out, or issue, or cause, or suffer to be made out or issued, any Citation, Summons, or other Process, to compel or oblige any Person to prove any Will, or to take out Letters of Administration, unless some Legatee, Creditor, Relation of the Deceased, or Person concerned in Interest in the Estate of the Deceased, shall apply to the said Court for the same; and every Judge, Officer, or other Person belonging to any such Court, making out, or issuing, or causing, or suffering to be made out, or issued, any such Citation, Summons, or Process, contrary to the Intent and Meaning of this Act, or neglecting, or refusing to cite the Executors, or next of Kin of any deceased Person, upon Application of any Legatee, Creditor, or such Relation as aforesaid, shall —

F I N I S.

